IN THE

Supreme Court of the United States

October Term, 1960

No. 122

ARMANDO PIEMONTE,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

Brief of Appellant

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INDEX

AUTHORITIES CITED

Cases

Statutes

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A. REFERENCE TO REPORTS.

There is no official or unofficial published report of the judgment of the trial court. The trial court delivered no formal opinion.

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 276 F. 2d 148. It is reprinted at pages 49 through 52 of the transcript of record.

B. JURISDICTIONAL GROUNDS.

This Court's jurisdiction is invoked under Title 28, United States Code, Section 1254 (1) and under Rule 19(b) of the rules of this Court.

The opinion of the Court of Appeals was rendered on February 29, 1960. Appellant's petition for rehearing was denied on May 3, 1960. Appellant's petition for certiorari was filed on June 2, 1960, and was granted on October 10, 1960.

C. STATUTES INVOLVED.

Title 18 United States Code, Section 1406, relating to immunity of witnesses, provides as follows:

IMMUNITY OF WITNESSES

Whenever in the judgment of a United States Attorney the testimony of any witness, or the production of books, papers, or other evidence by any witness, in any case or proceeding before any grand jury or court of the United States involving any violation of—

(1) any provision of part I or part II of subchapter A of chapter 39 of the Internal Revenue Code of 1954 the penalty for which is provided in subsection (a) or (b) of section 7237 of such Code,

(2) subsection (c), (h), or (i) of section 2 of the Narcotics Drugs Import and Export Act, as amended 21 U.S.C., sec. 174), or

(3) the Act of July 11, 1941, as amended (21 U.S.C., sec. 184*a*),

is necessary to the public interest, he, upon the approval of the Attorney General, shall make application to the court that the witness shall be instructed to testify or pro-

duce evidence subject to the provisions of this section, and upon order of the court such witness shall not be excused from testifying or from producing books, papers, or other evidence on the ground that the testimony or evidence required of him may tend to incriminate him or subject him to a penalty or forfeiture. But no such witness shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, nor shall testimony so compelled be used as evidence in any criminal proceeding (except prosecution described in the next sentence) against him in any court. No witness shall be exempt under this section from prosecution for perjury or contempt committed while giving testimony or producing evidence under compulsion as provided in this section.

Petitioner was sentenced under Title 18 United States Code, Section 401, which in its relevant part provides:

> "A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—
>
> * * * * * *
>
> (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command."

D. QUESTIONS PRESENTED FOR REVIEW.

I. Whether a prisoner in a federal penitentiary could properly be taken before a Grand Jury, granted "immunity" to testify as to narcotics transactions, held in contempt of court following his refusal to answer and given a substantial sentence, where the procedure followed leaves doubt as to whether or not immunity was actually sub-

stituted for a constitutional privilege; where, if immunity did ensue, the witness was necessarily left in doubt as to whether he was granted immunity; where orders entered upon him to testify were defective in form; where court and prosecutor openly differed as to his constitutional rights and as to what was required of him; and where he was thereafter indicted by the same Grand Jury?

II. Whether one can be held in contempt of a void verbal order which he fails to obey, or a written order which is never served upon him or otherwise brought to his attention?

E. CONCISE STATEMENT OF THE CASE.

On August 10, 1959 appellant was called as a witness before a Grand Jury (R. 4). In response to questions, he identified himself, and admitted that he was then imprisoned in Leavenworth penitentiary for narcotics violations. Asked where he had obtained the narcotics for the sale of which he had been sentenced, he claimed privilege under the Fifth Amendment. The prosecutor suggested he had no privilege relative to that question, but the witness persisted in his refusal (R. 5) and further refused to testify as to whether he knew certain named persons, had obtained from them the heroin involved in his conviction and the like (R. 5-8).

Three days later, petitioner was brought before the District Court (R. 13, 14). Although the identity of the lawyer then representing appellant was known to the prosecutor (R. 5), he was not notified and appellant was not represented at the hearing.

The prosecutor gave the court a transcript of appellant's grand jury testimony, and stated that he now felt that the appellant's claim of privilege was proper (R. 14). The

court replied that the privilege against self-incrimination had been properly claimed by appellant, except that it did not apply to questions concerning the source of the heroin involved in his prior conviction (R. 15).

In response to the court's statements, the prosecutor presented a petition (R. 9) which stated that the court had found that the appellant had properly claimed his privilege against self-incrimination in the course of the Grand Jury's investigations of narcotics violations, and that his testimony was in the public interest (R. 9). Appended to the petition was the affidavit of the United States Attorney setting forth that the Grand Jury was investigating illegal traffic in narcotics, and that the public interest required appellant's testimony. The affidavit further stated that the public interest required that the appellant be granted immunity in connection with his testimony, and that the application was made "in complete good faith". There was further appended a letter from the Attorney General authorizing the application (R. 10-11).

The court ordered that the transcript be filed and the file suppressed (R. 16). The court further found the petition to be in proper form and orally granted it (R. 16).

The court thereupon advised appellant as follows:

> ". . . this Court now grants you immunity from prosecution which might arise from any answers that you give to this Grand Jury concerning the matter of their investigation. It, therefore, is no longer necessary for you to invoke the protection of the Fifth Amendment to protect yourself from incrimination or subsequent prosecution, because . . . I now grant you immunity from such prosecution and direct you to answer the questions propounded to you by the Grand Jury." (R. 16)

Asked whether he understood the court's order, appellant replied that he did, but that he would like to talk to his lawyer. The court granted permission and directed that appellant's lawyer be telephoned (R. 16). The court further ordered that appellant not be further interrogated until he had seen his attorney (R. 17).

In its written order, which was entered on application of the United States Attorney, the court found only that appellant's answers would tend to incriminate him, and "therefore ordered" that the appellant answer questions before the Grand Jury "relative to the aforementioned inquiry of the said Grand Jury"—*i.e.*, investigation of violations of certain narcotics statutes (R. 12, 13).

The written order was not presented, mentioned or entered in appellant's presence. There is no record of any proceedings incident to the signing of this order, nor is the order shown to have been served on the appellant or otherwise brought to his attention. The earlier impounding order was not modified in favor of inspection by petitioner's attorney until after the appellant's second Grand Jury appearance (R. 25).

On the morning of August 14, appellant was again brought before the Grand Jury. He acknowledged the prosecutor's assertion that on the previous day, the trial court had granted him immunity and ordered him to answer questions "concerning narcotics" (R. 18). Appellant again admitted the fact of his conviction (R. 18, 19). He refused, however, on grounds of possible self-incrimination, to answer any of the prosecutor's other questions (R. 19).

The questions propounded to him on his second Grand Jury appearance dealt with transactions in marijuana and in heroin, with particular reference to the source of the

narcotics he had been convicted of selling (R. 19). Many questions were identical or substantially similar to questions put to him at the time of his first appearance. Other questions had not been asked previously. Among the questions not put to him until his second Grand Jury appearance, were whether he knew Nathaniel Spurlark; whether he had supplied Spurlark with heroin; whether he knew Jeremiah Pullings; whether he had supplied Pullings with heroin; and whether he knew Spurlark or Pullings to be "one of the largest wholesalers of heroin in the illicit traffic business in Chicago" (R. 22).

On September 2, 1959 the same Grand Jury before which appellant had appeared, indicted both appellant, Pullings, and others for conspiring to violate narcotics statutes, commencing in 1954 (R. 43).

A few hours after his second Grand Jury appearance, appellant was returned to the District Court (R. 23). His attorney being present for the first time (R. 30), he persisted in his refusal to answer questions (R. 24). An order was issued against defendant to show cause why he should not be punished for contempt. Formal answer to the rule was waived, and hearing was set for the following week (R. 24-25). Defendant's motion for jury trial was denied (R. 26).

The formal order entered against petitioner on that date (R. 27) cited him "for wilfully . . . blocking the search for truth . . . of the said Grand Jury . . . and obstructing the administration of justice"; and for wilful disobedience of the court's order requiring his testimony (R. 28).

On August 18, 1959, hearing was had before the court. The government rested on the transcripts filed (R. 29). Defendant testified that the basis of his refusal to answer

the questions was fear for his own life and for that of his wife and stepchildren (R. 33).

The court adjudged the appellant in contempt (R. 38) and sentenced him to a term of eighteen months' imprisonment, to commence upon the termination of his current term of imprisonment (41).

The Court of Appeals for the Seventh Circuit affirmed the judgment (R. 49-53). This Court granted certiorari.

G. ARGUMENT.

I.

The proceedings in the District Court do not afford an adequate basis to sustain a finding of contempt.

The opinion of The Court of Appeals was predicated upon two propositions: first, that fear of underworld retaliation did not provide a basis for refusing to testify. That proposition was laid to rest by the brief in opposition to our petition for certiorari, the government conceding that a man's motive for embracing his constitutional privilege is irrelevant if the privilege in fact exists (Gov't. Br. in Opp. 6).

The second proposition enunciated by The Court of Appeals was that: If the proceedings in the Trial court were sufficiently regular to have conferred immunity had appellant testified, then appellant's refusal to testify necessarily constituted contempt of court.

The question, we submit, is not whether the proceedings were sufficiently regular to have conferred immunity. The question is whether the proceedings below were so irregular that a refusal to rely upon their validity could constitute a punishable contempt of court.

* * *

Section 1406 provides a ritual which culminates in statutory immunity:

(a) A witness is interrogated before a grand jury or court.

(b) He must properly claim his privilege against self-incrimination in response to one or more specific questions.

(c) An application in conformance with the statute must be presented to the court.

(d) The court must approve the form of all prior proceedings and of the application itself, and must thereupon order that the witness answer one or more questions.

(e) The witness must thereupon answer the specified questions.

This procedure compares to that of the House of Commons relative to coerced testimony, commended in *Quinn* v. *United States*, 349 U.S. 155, 167. We invite the Court to contrast the procedures followed here.

At the time of his grand jury appearance, appellant stood convicted of sale and possession of heroin (R. 4). The prosecutor conducted an extensive inquiry concerning the unlawful *acquisition* of that heroin. But acquisition involves offenses distinct from unlawful sale and possession. (*Cf.* Title 26 U.S. Code, Sections 4705 (a) and 4705 (g); Title 21 U.S. Code, Sec. 174). Thus answers to the questions would surely have exposed appellant to possible prosecution for substantive offenses or conspiracies of which he had not been convicted.

The questions put to appellant were not addressed, except inferentially, to the offenses of which appellant was convicted. Instead, the questions related directly to offenses with which appellant had not then been charged. The court will note that this same grand jury indicted appellant for a conspiracy involving Pullings, about whom he was questioned. It is thus obvious that appellant was entitled to assert his privilege. This differs vastly from the state of affairs in *Reina* v. *United States*, No. 29, de-

cided by this court on December 19, 1960. Reina asked immunity from further execution of his sentence; appellant sought protection against further indictments.

Appellant took sanctuary in his privilege not to incriminate himself despite the prosecutor's expressed stand (R. 5) that appellant had no privilege as to questions relating to the acquisition of the heroin for whose sale appellant was convicted.

The sequence of events as it related to the claim of privilege in this area was:

1. The prosecutor advised appellant that he had no privilege (R. 5).
2. The prosecutor thereupon, in appellant's presence, told the court that he thought the privilege was properly asserted (R. 14).
3. The court disagreed, holding that appellant could not assert his privilege as to those matters (R. 15).
4. The court "granted immunity" and ordered appellant to "answer the questions propounded . . . by the grand jury." (R. 16).

It would seem that the most important question before the trial court was: Had appellant properly invoked the Fifth Amendment so that he might qualify for immunity under 18 U.S.C. 1406?

Yes, replied the trial court, but with one reservation. The trial court held that the constitutional privilege would not apply to ". . . questions . . . concerning the heroin for the sale and possession of which he is now serving a term". (R. 15)

But this included almost every question asked of appellant. At his first grand jury appearance, he had been

asked whether he knew fourteen different people. As to twelve of them, he was asked whether he had obtained from them the heroin, for the sale of which he was then imprisoned. (R. 5-8) A thirteenth, Helen Mack, was appellant's co-defendant at the time of his conviction (R. 8). The fourteenth, Lawrence Geraci, was mentioned in connection with the possible purchase by him from appellant of marihuana, a subject matter for investigation which falls outside the immunity statute (R. 5).

In essence therefore, appellant was told that he was getting immunity except where it counted. For presumably a witness could not win immunity should his claim of privilege be held to have been improperly asserted.

Hard on the heels of the court's ruling that appellant's claim of privilege was improper as to most of the matters put to him by the grand jury, the prosecutor presented (R. 16) a sworn petition to the effect that the court had not so held (R. 9). The Court of Appeals subsequently placed upon the court's ruling the interpretation that the trial judge found ". . . that the privilege was well taken except as to those questions asked on August 10 relating to the source of the narcotic drugs upon which his prior conviction rested." (R. 50).

A written order (R. 12-13) was subsequently entered which was itself in opposition to the court's verbal order. The written order found that appellant's privilege was properly asserted—presumably in all areas. There is no suggestion in the record that the written order was ever brought to appellant's attention. Indeed an earlier order impounding the file (R. 16) was not modified so as to permit inspection by appellant's attorney until the contempt citation had issued (R. 25).

But had appellant seen the written order, he could only have concluded that the trial court shared the prosecutor's fluctuating views as to the propriety of his attempted assertion of constitutional privilege.

In any event the written order was ineffective. It recited that a petition had been presented, and described it (R. 12). It contained a finding that appellant had properly asserted his constitutional privilege. It found that appellant's answers would tend to incriminate him. And it "therefore" ordered him to answer. (R. 13). The order recited that it was made "in accordance with Section 1406." But the order contained none of the findings relative to the regularity of the petition, that are required if a valid grant of immunity is to ensue from Section 1406. *Corona* v. *United States*, 6 Cir., 250 Fed. 2d 578, 579 (1958). Nor did the order state what questions appellant was required to answer. Nor did the written order even find that the prosecutor's petition was in proper form. Appellant would have been hard pressed to substantiate the regularity of the proceedings at a later date were he to have placed reliance in the written order.

Appellant's refusal to answer questions must be judged in the light of the circumstances which obtained at the time of his second grand jury appearance. *Bart* v. *United States*, 349 U.S. 219, 222. His position was not one where he might with impunity have surrendered his claim of constitutional privilege, confident that he could reassert it if the trial court were in error. *Powell* v. *United States*, D.C., Cir., 226 F. 2d 269, 276. The court's verbal assurances to the petitioner would have been insufficient protection at a later stage, had he been exposed to prosecution. *Foot* v. *Buchanan*, 5 Cir., 113 Fed. 156 (1902).

Appellant could not at his second grand jury appearance have possessed even a reasonable assurance as to what questions he was supposed to answer. All of them? The court held that his privilege had been improperly asserted as to the source of the heroin involved in his conviction; *ergo*, immunity could not attach in that area. Answer whether he knew the people named, but decline to answer whether he had obtained the heroin from them? This might well be a waiver of the privilege to refuse to state where he had obtained the heroin.

The only safe course for appellant was to persist in his claim of constitutional privilege. As distinguished from the proceedings in the trial court, the law requires that contempt be predicated only upon a foundation which is clear, incisive, and leaves no doubt as to what is required to be done. *National Labor Relations Board* v. *Deena Artware*, 6 Cir., 261 F. 2d 503, 509; *Traub* v. *United States*, D.C. Cir., 232 F. 2d 43, 48-49.

We further contend, that appellant is not a member of that class of persons upon whom punishment can be visited under the provisions of 18 U.S.C. Sec. 1406.

After appealing his sentence for contempt (R. 42), appellant was indicted by the same grand jury before which he had refused to testify (R. 43). But the Court of Appeals failed to accord due significance to the indictment. Its significance is this: The indictment relieved appellant of the consequences of his supposed contempt in refusing to testify. In effect, the return of the indictment purged the contempt.

Section 1406 does not authorize compulsion of the testimony of *any* witness. Its effect is limited to that witness whose refusal to testify is based upon his "having claimed his privilege against self-incrimination."

The privilege against self-incrimination is distinct from the privilege against being a witness in a criminal case against one's self. It is only the former privilege and not the latter for which Section 1406 can become a substitute.

By his indictment it became conclusive that the proceedings of the grand jury were part of a criminal prosecution directed against the appellant. *Counselman* v. *Hitchcock*, 142 U.S. 547, 562; *United States* v. *Monia*, 317 U.S. 424, 427. Accordingly, he was entitled to a privilege transcending his privilege not to incriminate himself. As a defendant he had an *absolute* right to refuse to testify.

That fact alone precluded his use as a witness by the prosecution. *Powell* v. *United States*, D.C. Cir., 226 F. 2d 269, 274.

From the express words of the Constitution, has arisen a derivative doctrine: In no investigation may a witness be compelled to say something that might be used against him in a subsequent criminal case in which he might be a defendant. The derivative doctrine is indispensable if the self-incrimination clause is to have practical value. It would avail nothing that a defendant might not be called as a prosecution witness, if he might be compelled to give the same testimony elsewhere for later use at his criminal trial.

There is a significant difference between the application of the express provision of the Constitution on the one hand, and the derivative doctrine on the other. Under the express provision, a defendant in a criminal case may simply refuse to testify, without assigning reasons. But a witness who is not then a defendant in criminal proceedings must avail himself of the derivative doctrine if he would remain silent. The witness, as opposed to the defendant, must assign reasons for refusal to testify suffi

ciently to bring himself within the scope of the Fifth Amendment, namely, that his testimony might tend to incriminate him. He is excused only as to specific matters as to which he claims privilege. Thus his privilege is merely conditional.

A further distinction between the absolute and conditional privileges is in point. When one is called merely as a witness, it cannot be assumed that answers will tend to incriminate, hence no privilege attaches before a claim of privilege is made. On the other hand, the absolute privilege follows as a matter of constitutional course from one's status as a defendant. It need not be claimed. It is there, obvious for all to see.

Section 1406 provides that if certain procedures are followed a *witness* may not assert the *conditional* privilege. In exchange for his privilege, he is granted immunity from prosecution. He is, therefore, ". . . not . . . excused from testifying . . . on the ground that the testimony . . . may tend to incriminate him. . . ." That is all that Section 1406 provides. Section 1406 does not abrogate the *absolute* privilege; it does not impair the right of a *defendant* in a criminal case to refuse to become a witness on any ground or none.

When Piemonte appeared before the Grand Jury, he claimed the only privilege then ostensibly available to him. The procedures undertaken under Section 1406 purported to strip him of his right to refuse to testify on the grounds of possible self-incrimination. The trial court considered that his persistent refusal constituted contempt.

However, by indicting Piemonte, the Grand Jury ratified his refusal to testify by disclosing that throughout the proceedings Piemonte had been absolutely privileged to refuse to be a witness at all.

The grand jury proceedings were, as it turned out, a part of a criminal case against appellant. Therefore, proceedings under Section 1406 could not have compelled appellant to testify. Proceedings under 1406, if valid, only deprived him of the right to refuse on the grounds that his testimony might incriminate him. But Section 1406 proceedings could not impair appellant's absolute right to refuse to be a witness against himself in a criminal case. The questions put to appellant before the grand jury were closely related to his eventual indictment. He was asked if he had been in the narcotics business in 1954 (R. 19). The indictment alleged that in 1954, he entered into a conspiracy for the sale of narcotics (R. 43, 44.) He was asked if he knew Jeremiah Pullings, or had supplied Pullings with heroin (R. 22). The indictment alleged that Pullings had joined with appellant in the alleged conspiracy (R. 44.) Not only were the grand jury proceedings a part of a criminal case against appellant, but the very questions asked of appellant related directly to allegations made within his subsequent indictment.

Appellant should not be punished for refusing to testify before the grand jury. As it turned out appellant was well within his rights in so refusing. Under Section 1406, he might be stripped of his right to avoid answering on the ground of possible self incrimination. But he was never stripped of his paramount right to refuse to be a prosecution witness against himself in a criminal case.

II.

The verbal order of court requiring petitioner's testimony was void, so that petitioner could not properly be held in contempt for refusing to comply with that order. The record is absolutely barren of evidence to the effect that the Trial Judge's written order, which may or may not have been a valid order, was brought to the notice of petitioner, so that petitioner could not be in contempt for failure to comply with that order.

On August 13, 1959 the District Judge, in petitioner's presence in open court, stated that he, the Judge, was conferring immunity from prosecution: ". . . this court now grants you immunity from prosecution . . ." and ". . . I now grant you immunity from such prosecution and direct you to answer the questions propounded to you by the Grand Jury" (R. 16).

The court's order was clearly void. The court lacked power himself to grant immunity from prosecution. *Isaacs v. United States*, 8 Cir., 256 F. 2d 654, 661 (1958) held that an attempt by a trial judge to grant immunity in exchange for testimony constituted an invasion of executive and legislative powers. See also *Ullmann v. United States*, 350 U. S. 422, 434 (1956) The court's authority was limited to making certain findings, *i.e.*, whether the statutory requirements were complied with by the Grand Jury, the United State's Attorney, and the Attorney General. *Ullmann v. United States, supra*, 434; *Corona v. United States*, 6 Cir., 250 F. 2d 578, 579 (1958).

The Court of Appeals for the Seventh Circuit, in reviewing this case seemed to concede the invalidity of the verbal order:

> "Strictly speaking, the criticism may be well founded that the court itself could not grant immunity." (R. 52)

The opinion explained that the situation was really alright, because the trial judge had merely adopted his own way of expressing to petitioner the immunity granted by the statute. But the defect in the situation derived from the facts that: (a) the judge's verbal order was nonetheless void because the judge had no authority to grant immunity, and, (b) The written order which was entered was never shown to have been brought to petitioner's attention.

If the verbal order was void, petitioner could properly fail to comply with it. If petitioner did not have actual notice of the written order, assuming it to be valid, his failure to comply with it could not form a basis for contempt. Nothing in the record suggests that petitioner had an opportunity to examine it prior to his refusal to testify at his second Grand Jury appearance. For aught it appears, the written order was entered *ex parte*. The record raises doubts as to whether or not the written order was even available for examination prior to petitioner's second appearance before the Grand Jury. The written order does not have the stamp of the clerk of court thereon, from which it might be determined when the order was filed. If the order was simply signed on the date it bears, was never shown or read to petitioner, and was not even available in the office of the clerk of court for inspection by petitioner or someone acting for him, the order would, in petitioner's eyes, simply not exist. Such is the state of the record that it not only fails to show beyond a reasonable doubt that petitioner had notice of the written order, but it appears affirmatively that petitioner could not have had notice of that order. Thus the only order of which petitioner had notice was the court's void verbal order.

But one cannot be punished for contempt of a court order unless he has actual notice of that order. Further, in the sort of case before this Court, the government has the burden of proving that the supposed contemnor had such actual knowledge. Thus in *United States* v. *Hall*, 2 Cir., 198 F. 2d 726, 729 (1952) the court observed that under 18 U. S. C., Section 401(3):

> "... there must be proof of the contemnor's knowledge of the order ... and the burden on the government is a high one."

Nor is constructive notice of the order entered sufficient. There must be actual knowledge of the entry of the order, and the government must prove that knowledge by substantial evidence, *United States* v. *Thompson*, 2 Cir., 261 F. 2d 809, 810 (1958).

In *Green* v. *United States*, 356 U. S. 165 (1958), this Court acknowledged the existence of the rule requiring actual knowledge, holding (pp. 178-179) that the District Judge was justified in finding that the evidence established, beyond a reasonable doubt, that the contemnors there knew of the order which formed the basis of the citation. One Justice, dissenting on a question of fact, stated the rule which the majority assumed to be the correct rule, in the following language:

> "The indispensable element of that offense [violations of 18 U. S. C., Section 401 (3)] is that the petitioners, who were not served with the order, in some other way obtained actual knowledge of its existence and command." *Green* v. *United States*, 356 U.S. 165, 221 (1958)

In the matter before your Honors no showing of any kind was made that the petitioner was either served with or had actual knowledge of the order for whose violation

he was sentenced. He only had knowledge of an order which was void and which he had every right not to obey.

CONCLUSION.

We respectfully urge that whether or not the proceedings below were sufficiently regular to have conferred immunity as to testimony sought to be compelled, they were so irregular that a refusal to rely upon their validity could not constitute a punishable contempt of court. We ask this Court to reverse appellant's conviction.

Respectfully submitted,

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